IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,
v.
SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONERS

JOHN W. VARDAMAN, JR.
WILLIAM E. MCDANIELS
JANE E. GENSTER
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

NEAL M. MAYER
COLES & GOERTNER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JONATHAN BLANK
PRESTON, THORGRIMSON, ELLIS, HOLMAN & FLETCHER
919 - 18th Street, N.W.
Washington, D.C. 20006

August 16, 1979 *Counsel for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Question Presented 2

Statement of the Case 2

A. Statutory Framework 3

B. Statement of Facts 7

Summary of Argument 14

Argument 18

THE MERCHANT MARINE ACT, 1936 AUTHORIZES THE SECRETARY OF COMMERCE TO AMEND A CONSTRUCTION DIFFERENTIAL SUBSIDY CONTRACT TO RELEASE DOMESTIC TRADE RESTRICTIONS UPON A VESSEL IN EXCHANGE FOR FULL SUBSIDY REPAYMENT..

A. Introduction 18

B. The Act Amply Authorizes the Secretary's Challenged Action 20

C. Section 506 Poses No Bar to the Permanent Release of Trade Restrictions in Consideration for CDS Repayment 24

1. The Language and Logic of § 506 Are Consistent with the Secretary's Action 24

2. The Legislative History of § 506 Demonstrates a Congressional Intent to Permit the Permanent Release of Trade Restrictions Upon Full CDS Repayment 30

a. The Pre-Enactment History 30

b. The 1938 Amendment 39

INDEX—Continued

Page

D. The Permanent Release of Domestic Trade Restrictions in Exchange for Full CDS Repayment Is Supported by a Longstanding and Consistent Agency Interpretation that Congress Has Knowingly Affirmed 50

1. The *Grace Line* Precedent 51

2. Congressional Affirmation of the *Grace Line* Precedent 61

E. The Challenged Action of the Secretary Is Fully Supportive of and Consistent with the Act's Fundamental Policy Objectives 67

Conclusion 76

Addendum 1a

TABLE OF AUTHORITIES

CASES: Page

American Maritime Ass'n v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 2161 (1979) 4, 54

Board of Governors of the Federal Reserve System v. *First Lincolnwood Corp.*, —— U.S. ——, 47 U.S.L.W. 4048 (December 11, 1978) 51, 67

E.I. du Pont de Nemours & Co. v. *Collins*, 432 U.S. 46 (1977) 66

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 66

Pennsylvania Railroad Co. v. *Dillon*, 335 F.2d 292 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964) .. 69

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 75

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 51, 66

States Marine International, Inc. v. *Peterson*, 518 F.2d 1070, (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976) 23, 69

Udall v. *Tallman*, 380 U.S. 1 (1965) 66

Whitman v. *United States*, 110 F. Supp. 444 (Ct. Cl. 1953) 22

Zemel v. *Rusk*, 381 U.S. 1 (1965) 61

STATUTES:

Federal Ship Financing Act of 1972, P.L. 92-507, 86 Stat. 909 61

Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101 *et seq.*, as amended ..... *passim*

Title I, § 101 of the Act, 46 U.S.C. § 1101 ..... 4, 20

Title II, § 207 of the Act, 46 U.S.C. § 1117 ..... *passim*

Title II, § 210 of the Act, 46 U.S.C. § 1120 ..... 5, 20

Title II, § 211 of the Act, 46 U.S.C. § 1121 ..... 5, 20

Title II, § 212 of the Act, 46 U.S.C. § 1122 ..... 5, 20

Reorganization Plan No. 21 of 1950, 64 Stat. 1273 (1950) 22

TABLE OF AUTHORITIES—Continued

Page

Reorganization Plan No. 7 of 1961, 75 Stat. 840 (1961) ... 22
Title V, § 501 of the Act, 46 U.S.C. § 1151 ... 6, 22
Title V, § 502 of the Act, 46 U.S.C. § 1152 ... 6
Title V, § 503 of the Act, 46 U.S.C. § 1153 ... 6
Title V, § 504 of the Act, 46 U.S.C. § 1154 ... *passim*
Title V, § 505 of the Act, 46 U.S.C. § 1155 ... 7
Title V, § 506 of the Act, 46 U.S.C. § 1156 ... *passim*
Title XI, § 1104(a)(3) of the Act, 46 U.S.C. § 1274 (a)(3) ... 23, 61-67

Merchant Marine Act of 1920, § 27, as amended, 46 U.S.C. § 883 ("Jones Act") ... *passim*
Pub. L. No. 91-469, 84 Stat. 1018 (1970) ... 61
Pub. L. No. 75-705, 52 Stat. 958 (1938) ... 39
Pub. L. No. 74-835, 49 Stat. 1985 (1936) ... 38

LEGISLATIVE MATERIALS:

Reports

H.R. Doc. No. 118, 74th Cong., 1st Sess. (1935) ... 31
H.R. Rep. No. 688, 92d Cong., 1st Sess. (1971) ... 63-65
H.R. Rep. No. 2168, 75th Cong., 3d Sess. (1938) ... 40, 47, 50
H.R. Rep. No. 1277, 74th Cong., 1st Sess. (1935) ... 34
S. Rep. No. 1618, 75th Cong., 3d Sess. (1938) ... 45-46
S. Rep. No. 1721, 74th Cong., 2d Sess. (1936) ... 34
S. Rep. No. 713, 74th Cong., 1st Sess. (1935) ... 21
S. Rep. No. 898, 74th Cong., 1st Sess. (1935) ... 31-33

Bills

H.R. 9756, 92d Cong., 1st Sess. (1971) ... 62
H.R. 8555, 74th Cong., 1st Sess. (introduced by Rep. Bland on June 19, 1935) ... 34
H.R. 7521, 74th Cong., 1st Sess. (1935) ... 33
S. 4110, 74th Cong., 2d Sess. (1936) ... 36
S. 3500, 74th Cong., 2d Sess. (Committee Print, March 3, 1936) ... 35
S. 2582, 74th Cong., 1st Sess. (as amended and reported, May 24, 1935) ... 27
S. 2582, 74th Cong., 1st Sess. (1935) ... 33

TABLE OF AUTHORITIES—Continued

Hearings Page

Amending Merchant Marine Act, 1936: Hearings on H.R. 8352 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d and 3d Sess. (1937-1938) ... 41-42
Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committees on Commerce and Education and Labor, Part I, 75th Cong., 2d Sess. (1937) ... 48-49
Proposed Amendments to the Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. (1971) ... 73
Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110, and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. (1936) ... 36-37

MISCELLANEOUS:

43 Fed. Reg. 51045 (1978) ... 74
42 Fed. Reg. 62025 (1977) ... 13
G. Gilmore & C. Black, Jr., *The Law of Admiralty* (2d Ed. 1975) ... 5, 31
Opinion of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964) ... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 595 F.2d 814 and set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-61a. The opinion of the district court is reported at 445 F. Supp. 1128 and set forth in the Pet. App. at 65a-95a.

JURISDICTION

The court of appeals entered judgment on February 6, 1979 and denied a timely petition for rehearing with a suggestion for rehearing en banc on March 22, 1979. (App. at 600-601.) The petition for a writ of certiorari was filed on April 30, 1979 and granted on June 18, 1979. (App. at 604.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101, *et seq.* (1976), and the Jones Act, as amended, 46 U.S.C. § 883 (1976), are set forth in the Addendum hereto.

QUESTION PRESENTED

Whether the broad contracting authority of the Secretary of Commerce under the Merchant Marine Act, 1936 includes the power to amend a construction differential subsidy contract to remove domestic trade restrictions in consideration for full subsidy repayment, where the existence of such power is supported by the legislative and administrative history of the Act and furthers the Act's fundamental policy goals.

STATEMENT OF THE CASE

The T.T. STUYVESANT is a 225,000 deadweight ton oil tanker constructed by petitioner Seatrain

Shipbuilding Corporation ("Seatrain") for petitioner Polk Tanker Corporation ("Polk") between 1972 and 1977. The vessel was constructed with the assistance of a $27.2 million construction differential subsidy ("CDS") from the federal government. In contracting for the CDS, Seatrain and Polk agreed to limit the vessel's operation in the domestic trades in accordance with Title V of the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101, *et seq.* (1976) ("the Act").

On August 31, 1977, the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board took a series of actions that enabled the STUYVESANT to engage in the domestic transportation of Alaskan oil. Those actions included a decision to accept a full repayment of the $27.2 million CDS and, in exchange, to delete from the contract the domestic trade restrictions. The three respondent companies filed suit for declaratory and injunctive relief, contending *inter alia* that the Act does not authorize the removal of trade restrictions in consideration for subsidy repayment. The district court's decision that the Act empowered the federal officials to take the challenged actions was reversed by a divided panel of the court of appeals.

A. Statutory Framework

The Merchant Marine Act, 1936 was designed to "foster the development and encourage the maintenance" of an efficient U.S.-built, owned, manned and serviced merchant marine capable of meeting the na-

tion's defensive and commercial needs in its domestic and foreign trades.[1] Section 101 of the Act, 46 U.S.C. § 1101, articulates the Act's broad policy goals:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The Act vests in the Secretary of Commerce commensurate responsibility and authority to administer the nation's maritime functions; she is broadly charged to keep current on the entire industry and

[1] U.S. domestic trade is trade between ports in this country, its territories, districts, and possessions. U.S. foreign trade is trade between a domestic and a foreign port. *See American Maritime Ass'n* v. *Blumenthal,* 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied,* —— U.S. ——, 99 S.Ct. 2161 (1979).

"to study all maritime problems arising in the carrying out of the policy set forth in Title I of this Act." (Sections 210-212 of the Act, 46 U.S.C. §§ 1120-1122.) The Secretary is empowered to "enter into such contracts . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the [government] to secure indebtedness. . . ." (Section 207 of the Act, 46 U.S.C. § 1117.)

The construction differential subsidy program, codified in Title V of the Act, 46 U.S.C. §§ 1151-1161, was designed to stimulate shipbuilding in the United States and to increase the number of American-owned vessels. These goals had previously been fostered by the Jones Act, 46 U.S.C. § 883, which has since 1920 reserved U.S. domestic trade exclusively for vessels built in this country, documented under U.S. law and owned by U.S. citizens.[2]

However, no similar protectionist provisions could or do attach to the operation of vessels in the nation's foreign trades. Because the cost of building ships in this country is and has historically been higher than

[2] Predecessor statutes have essentially reserved U.S. domestic trade to domestic vessels since the late 18th century. *See* G. Gilmore & C. Black, Jr., *The Law of Admiralty* 963 & n.34 and 35 (2d Ed. 1975).

that of building them abroad, simple economics would dictate the use of foreign shipyards for ships intended for the foreign trades in the absence of some equalizer. Congress supplied that equalizer in Title V: the CDS program authorizes the Secretary to subsidize the domestic construction of vessels owned by U.S. citizens and intended for the foreign trade by paying, under contracts with shipbuilders and owners, the approximate difference between the cost of domestic and foreign construction.[3]

The Secretary of Commerce and her delegees (hereinafter collectively referred to as "the Secretary") have full authority over the administration of the CDS program. Section 501, 46 U.S.C. § 1151, provides that CDS applications be submitted to the Secretary who is afforded broad discretion to determine subsidy eligibility. Sections 502 and 504, 46 U.S.C. §§ 1152 and 1154, outline the basic CDS contracting authority; that authority is expansive in accordance with the Act's multiple policy goals. Section 503, 46 U.S.C. § 1153, provides that CDS-built vessels shall be documented under the U.S. flag

[3] Title V provides two alternative methods of subsidizing U.S. vessel construction. The first method, which permits the Secretary to finance fully the construction of a vessel and contract to sell it at a reduced price, is not at issue in this case. The second method, which is discussed *supra*, was the method used by the Secretary to subsidize the STUYVESANT's construction.

throughout their useful lives and § 505, 46 U.S.C. § 1555, requires that subsidized vessels be constructed in U.S. shipyards with domestic materials. Finally, as relevant to this proceeding, § 506, 46 U.S.C. § 1156, provides that owners of vessels for which CDS has been paid "shall agree" to limit the operation of their vessels to the foreign trade. Section 506 also provides that the Secretary may, when she determines it "necessary or appropriate to carry out the purposes of this Act," permit a CDS vessel to engage in certain incidental domestic trade, or to operate temporarily in the domestic trades for six months in any year, in exchange for a partial, proportionate CDS repayment.

Title XI provides an additional method by which the federal government may assist the financing of shipbuilding in the country. Obviating the need for a shipowner to use his own credit to raise construction capital, this title authorizes the agency to provide substantial loan guarantees to finance initial construction and reconstruction costs of a vessel and a full or partial CDS repayment.

B. Statement of Facts

In 1969, when the projected international demand for tankers was rising and an imminent shortfall in tonnage was universally predicted, Seatrain commenced construction of a series of supertankers at the shipbuilding facilities of the former Brooklyn Navy Yard. Seatrain's adaptation of those facilities,

and institution and maintenance of a program to train and employ hard-core unemployeds from the Bedford-Stuyvesant section of Brooklyn, attracted substantial economic assistance from the Economic Development Administration of the Department of Commerce ("EDA"), including loans of $5 million and 90% guarantees of $82 million in loans to Seatrain. (App. at 111-113.)

The third vessel in the construction program, the T.T. STUYVESANT, was constructed between 1972 and 1977. (App. at 111, 112-113.) Its construction was initially assisted by loan guarantees of $30.2 million pursuant to Title XI of the Act and a $27.2 million construction differential subsidy paid pursuant to Title V of the Act under contracts executed in June 1972. As required by § 506, the STUYVESANT's CDS contracts contained terms restricting the vessel's operation in the domestic trade.[4]

Trade conditions changed dramatically during the six years that the STUYVESANT was under construction. The 1973 Middle East conflict, the Arab oil embargo and ensuing worldwide economic problems converged to decrease drastically the demand for supertankers in the foreign trades. By 1977,

[4] *See* Construction-Differential Subsidy Contract MA/MSB-164 between the Maritime Subsidy Board and Seatrain Shipbuilding Corp., executed June 30, 1972 (App. at 439, 441); Contract MA/MSB-165 between the Maritime Subsidy Board and Polk Tanker Corporation, Article 9(b)(i), executed June 30, 1972 (App. at 481, 497-498).

the foreign tanker market that the STUYVESANT had been constructed to serve offered no prospect for its employment. However, at the same time, the domestic transportation of Alaskan oil—reserved to U.S.-built, owned and operated vessels by the Jones Act—was a thriving and undertonnaged tanker trade that sought the STUYVESANT's service. (App. at 112-113; Pet. App. at 9a-10a.)

In mid-1977, Polk secured an attractive opportunity to charter the STUYVESANT for three years to Standard Oil Company of Ohio ("SOHIO") to carry oil between Alaska and Panama and, as a result of the charter, to sell the vessel. The charter and sale were premised upon the vessel's ability to obtain release from the domestic trade restrictions in its CDS contract. (App. at 113-114.)

On August 25, 1977, Polk applied for permission to repay the $27.2 million subsidy in exchange for the permanent release of domestic trade restrictions on the STUYVESANT.[5] (App. at 523-528.) As reflected in letters to Polk dated August 31, 1977, the

[5] In July 1977, Polk applied for permission to operate the vessel in the domestic Alaskan oil trade for the three-year life of the SOHIO charter in exchange for a pro-rata subsidy repayment. Notice of the application was published in the Federal Register, and it was opposed by a number of parties. The prospect of substantial delay caused Polk to withdraw its application and propose instead the full subsidy repayment and permanent release of trade restrictions. (App. at 115-116, 507-522, 529.)

Secretary approved Polk's request for CDS repayment and trade restriction release, provided that repayment be made by a fully secured and interest-bearing promissory note, and authorized the issuance and sale of $31 million of federally-insured bonds in connection with the repayment, charter and sale transaction. (App. at 530-541.) The Secretary's approval was based upon her findings that (1) the Alaskan oil trade provided the only viable employment opportunity for the STUYVESANT, (2) the SOHIO charter, which depended upon the vessel's release from domestic trade restrictions, would improve the government's collateral position and prevent default on government-guaranteed debt, and (3) failure to approve the proposal would jeopardize the continued operation of the Seatrain shipyard, which is backed by substantial government loans and guarantees. (App. at 530.)

A closing of the various financial transactions surrounding the repayment, sale and charter of the STUYVESANT was scheduled for September 23, 1977. (App. at 117.) On September 22, 1977, the respondents filed suits against the Department of Commerce officials,[6] seeking temporary and perma-

[6] Alaska Bulk Carriers, Inc. and Trinidad Corporation filed an action against the Secretary of Commerce Juanita M. Kreps, Assistant Secretary of Commerce Robert J. Blackwell, the Maritime Administration and the Maritime Subsidy Board. In addition to Secretary Kreps and Assistant Secretary Blackwell, Shell Oil Company sued Howard F. Casey,

nent injunctive relief from their decisions concerning the STUYVESANT. The plaintiffs argued: (1) that the Secretary lacked authority to release the STUYVESANT from the domestic trade restrictions, (2) that, in any event, the Secretary had abused her discretion by failing to consider the competitive effects of these transactions, and (3) that the Secretary had not adhered to the procedures prescribed by the Administrative Procedure Act ("APA"), in violation of 5 U.S.C. § 706(2)(D). Seatrain and Polk were permitted to intervene as defendants.

A temporary restraining order was granted and subsequently dissolved when the court denied preliminary injunctive relief. (App. at 167-171.) The transactions closed on September 30.[7] As a result of

then Deputy Assistant Secretary of Commerce, and Samuel B. Nemirow, then General Counsel to the Maritime Administration.

[7] At that time, the STUYVESANT was transferred to United States Trust Company ("USTC") as owner-trustee for the new equity owner, General Electric Credit Corporation ("GECC"). The Secretary amended the STUYVESANT's CDS contract to delete the restrictions on the vessel's domestic trading, and Polk issued a fully collateralized promissory note for $27,200,000 to the Secretary in repayment of the full amount of the CDS. The note was assumed by USTC which also assumed responsibility for $60,200,000 of government-insured indebtedness on the vessel, $31,355,000 of which is indebtedness incurred at the closing through the sale of bonds. The proceeds received from the sale of the bonds were used to repay loans of $28,600,000 guaranteed by the EDA. USTC also paid Polk $32,600,000 in cash; these funds were placed in an interest-bearing certificate of deposit ac-

these transactions, (1) the Department of Commerce received a fully collateralized $27.2 million note in repayment of the subsidy; (2) Seatrain repaid $28 million of loans that had been guaranteed by EDA; (3) the STUYVESANT, which supports over $60 million of government-insured indebtedness, is profitably employed rather than standing idle in lay-up, and (4) a critical shortage of tonnage for the transportation of Alaskan oil was alleviated. (App. at 530, 570-571, 581-584.) The STUYVESANT has been transporting oil from Alaska to Panama for SOHIO since that time.

After the transaction closed, the district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from domestic trade restrictions in consideration for full CDS repayment. The court further held, however, that the Secretary had abused her discretion in failing to consider fully the competitive impact of her decision concerning the STUYVESANT. Accordingly, the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. (App. at 556-557.)

count and secure a guarantee to GECC provided by Seatrain Lines, Inc., the parent corporation of Seatrain and Polk. USTC then bareboat-chartered the vessel to Queensway Tankers which in turn time chartered it to SOHIO for three years. (*See* App. at 116-118, 570-571.)

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss a remaining, unresolved claim and urged the entry of a final order. The district court granted this motion on November 30, 1977. (App. at 558-559.) While the Secretary was conducting the proceedings on remand, the plaintiffs appealed from the district court's holding that the Secretary has the authority to accept repayment and permit a ship to engage in the domestic trade. (App. at 560-561.)[8]

Prior to oral argument in the court of appeals, the Secretary invited public comment upon the issues that the district court had directed her to consider[9] and issued a reconsidered decision on January 6, 1978. That decision examined the Alaskan tanker market in detail, explained the market need for the STUYVESANT's services during the three years of the SOHIO charter, and concluded that the competitive effect of accepting CDS repayment under the terms earlier approved and of allowing the STUYVESANT to engage in the Alaskan oil trade is

[8] In their brief on the petition for certiorari, the federal parties sought the summary vacation of the judgment of the court of appeals on the ground that the November 30 order was not a final order under 28 U.S.C. § 1291 (1976) and that the court therefore lacked jurisdiction over the appeal. The petitioners have not raised, and do not independently brief, that issue. However, the petitioners fully support, adopt and incorporate by reference the position on the jurisdictional issue set forth comprehensively in the merits brief contemporaneously filed by the federal parties.

[9] 42 Fed. Reg. 62025 (1977).

"none or minimal." (App. at 566-599.) As a result, the Secretary affirmed her earlier approval of the repayment, charter and sale transaction. (App. at 568-569.)

A divided panel of the court of appeals reversed the district court's decision. Interpreting the Act to earmark permanently subsidized and unsubsidized vessels for "two completely separate competitive areas" (Pet. App. at 50a), the panel majority concluded that the Secretary's action is unauthorized by the Act, implicitly prohibited by § 506, and contrary to the Act's overall purposes. Judge Bazelon dissented, noting that neither the legislative history of § 506 nor the Act's policy objectives warrant the panel majority's disregard of the Secretary's interpretation of her powers under the Act.

SUMMARY OF ARGUMENT

The departmental action challenged in this case comports with a relatively longstanding, consistent and principled interpretation of the Secretary's authority under the Act. That interpretation has been brought to the attention of Congress which has not only approved but also facilitated the exercise of the disputed power. Under those circumstances, the federal courts are obliged to defer to the administrative construction in the absence of "compelling indications" that it is incorrect. No such indicia of error on the Secretary's part are present here. Rather, an

analysis of the language, legislative history and policy objectives of the Act demonstrate the validity of the historic agency interpretation and of the Secretary's 1977 decision to allow the STUYVESANT to enter the domestic trade.

The Act entrusts expansive discretionary contractual authority to the Secretary. That authority includes the entire administrative power to make, amend and terminate CDS contracts under Title V. The restriction on a CDS vessel's operation in the domestic trade is a provision in the CDS contract, exacted as a *quid pro quo* for the subsidy payment by the government. In the absence of some statutory prohibition, the Secretary is amply empowered to amend or delete the provision in consideration for full CDS repayment.

No such statutory prohibition can be found in the Act. Although § 506 imposes conditions on the temporary and incidental operation of CDS vessels in the domestic trade, it does not address the trading opportunities open to a vessel that has remitted its CDS in full to the government. The logic of the statutory provision does suggest, however, that any trade restrictions that attach as a condition of the subsidy's receipt should be removed in consideration for its full repayment, if the Secretary finds that such action would further the purposes of the Act.

An analysis of the Act's legislative history plainly establishes that result as the intention of the framers

of the Act. Indeed, multiple bills proposed prior to the Act's passage, statements in the relevant Congressional reports, the comments of the Act's pioneers, including Senators Black, Copeland and Guffey, and the original language of § 506 all expressly contemplated and approved the permanent release of the trade restrictions upon full subsidy repayment. Congress perceived that a vessel that retains its subsidy and a vessel that remits its subsidy occupy different competitive postures. The potential for unfair competition posed by a vessel that continues to enjoy the full economic benefits of subsidy merits restrictions on its domestic trading. No such restriction is warranted, however, for a vessel that has repaid its subsidy and has thus been placed on a parity with all other unsubsidized vessels.

A 1938 amendment to § 506 resulted in the deletion of the language describing the Secretary's permanent release authority. That amendment, however, was enacted only to clarify the requirement of partial CDS repayment in exchange for temporary or incidental domestic trading by a CDS vessel. The contemporaneous history provides no indication that any member of Congress understood or intended that amendment to deprive the Secretary of the power at issue here. Rather, it establishes that the Congress intended to effectuate no fundamental change in the section's original purpose and thus left intact the authority extended in 1936.

The Department has consistently interpreted the Act to authorize the release of domestic trade restrictions upon full CDS repayment. It first exercised the authority in 1964 in response to a request by Grace Line that the agency amend CDS contracts on two of its vessels to delete the domestic trade restrictions in exchange for full CDS repayment. At that time, the agency decided and the Comptroller General agreed that no provision of the Act, including § 506, prohibited the exercise of that authority. That interpretation has been consistently, albeit sparingly, reaffirmed by the agency in the intervening years. Congress has taken no steps to curb that authority. Instead, Congress knowingly approved the interpretation and promoted the exercise of the Secretary's permanent release authority in its 1972 amendments to the Act.

The Secretary's 1977 decision to release the STUYVESANT from domestic trade restrictions served all of the Act's multiple purposes, including the protection of unsubsidized owners from unfair competition. The Secretary's decision deployed an otherwise unmarketable vessel to the undertonnaged Alaskan oil trade, protected the investments of the government in its merchant marine, and contributed significantly to the existence of domestic shipbuilding and repair facilities. These actions respond directly to the Act's overriding and fundamental goals of fostering and maintaining an efficient national merchant marine.

The respondents seek, and were allotted by the court of appeals, a permanent monopoly that Congress never awarded them. The Act does not insulate the respondents from fair competition with domestic vessels in the coastwise trades. It extends them no license to exploit a demand/supply imbalance in the domestic trades when an American-built, owned and operated vessel can trade on a parity with them rather than stand idle in lay-up. The decision below undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades. The judgment of the court of appeals should be reversed.

ARGUMENT

THE MERCHANT MARINE ACT, 1936 AUTHORIZES THE SECRETARY OF COMMERCE TO AMEND A CONSTRUCTION DIFFERENTIAL SUBSIDY CONTRACT TO RELEASE DOMESTIC TRADE RESTRICTIONS UPON A VESSEL IN EXCHANGE FOR FULL SUBSIDY REPAYMENT.

A. Introduction

The decision of the Secretary in August 1977 to accept full CDS repayment and, in exchange, to delete the provision restricting domestic trading from the STUYVESANT's CDS contracts was not a unique or unprecedented event. While the confluence of economic factors that prompted and support her decision were extraordinary, the power that she exercised is

one that the Secretary of Commerce has traditionally interpreted the Act to grant. That consistent departmental interpretation had served as the basis for a series of similar decisions by the Secretary over the last fifteen years, had been well known within the maritime industry, and had been brought to the attention of and ratified by Congress prior to its invocation in connection with the STUYVESANT.

Only two events related to the STUYVESANT's release, charter and sale transaction are unprecedented. First, the corporate respondents—who own or operate vessels in the domestic Alaskan oil trade —sought to preclude a new competitor from the important Alaskan oil trade by challenging the Secretary's longstanding interpretation of her powers. Second, in concluding that the Secretary lacks the exercised authority, a divided panel of the court of appeals awarded the unsubsidized Jones Act owners a novel permanent monopoly in the domestic trades.

In declaring the Secretary's actions beyond her statutory authority, the panel majority concluded that the permanent removal of domestic trade restrictions on a CDS-built vessel is not authorized by any provision of the Act, is implicitly precluded by § 506, and is contrary to the overall purposes of the Act. The discussion below demonstrates that each of the conclusions is erroneous, for (1) the Act amply empowers the Secretary to take the action challenged here; (2) § 506 does not bar the permanent

removal of trade restrictions; and (3) the action is fully supportive of and consistent with the congressional policy expressed in the legislative history and the structure of the Act, including § 506 itself.

B. The Act Amply Authorizes the Secretary's Challenged Action.

The Secretary's authority to take the challenged action derives from the broad contracting authority granted her under the Act and, in particular, Title V. No provision of the Act authorizes *in haec verba* the deletion from a CDS contract of terms restricting the domestic trading of a vessel built with CDS assistance in exchange for full CDS repayment. That omission, however, does not deny the Secretary that amendatory authority where such a power is included within the broader authority afforded by the Act. An analysis of the Act discloses an expansive grant of contractual powers to the Secretary that amply authorizes her decision concerning the STUYVESANT.

The Act entrusts to the Secretary the formidable obligation to effectuate the policy goals set forth in Title I. That title declares a national policy of bolstering domestic shipyards, and fortifying and increasing the number and competitive abilities of Jones Act vessels in both the domestic and foreign trades. To that end, §§ 210-212 of the Act charge her with the responsibility for studying, keeping up to date, taking action, and making recommendations on every facet of the international shipping industry.

The discretionary powers afforded the Secretary under the Act are as broad as the duties imposed upon her. At the Act's inception, Congress articulated and explained its intent to grant broad authority to the Act's administrators:

> The [agency] is given a considerable amount of discretion in the solution of its problems. . . . Shipping is a business of a highly competitive and constantly changing nature, and its governmental contact must be given the power of prompt decision in dealing with situations as they arise.[10]

That congressional judgment is reflected in both the general authority granted the Secretary under the Act, and in the more specific powers afforded her under Title V.

Section 207 grants the Secretary the type of broad contractual power necessary to carry out her statutory responsibilities under the Act. Section 207 empowers the Secretary to "enter into such contracts, upon behalf of the United States, . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve or improve the collateral held by the [government] to secure indebtedness. . . ."

Pursuant to Title V, the Secretary exercises the entire administrative authority over the CDS program. Although the statute establishes requirements

[10] S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935).

for eligibility, maximum subsidy percentage and place of vessel construction, it entrusts the program's implementation and the many-faceted economic judgments to the Secretary's discretion. Section 504 confers upon her the full power to make CDS contracts, and that section has been recognized in reorganization plans, correctly we submit, to include the related authority to amend and terminate such contracts.[11] The Secretary's CDS contracting authority entails the right to include terms to protect the interest of the United States, and is qualified only by the requirement of §§ 501(a) and 504 that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent *expressly* required by law." (Emphasis added.)

The domestic trade restrictions from which the STUYVESANT was released were a provision in its CDS contracts. The Secretary's contractual powers under the Act embrace the ability to amend the contract to delete those terms in consideration for subsidy repayment, unless the existence of such authority

---

[11] Reorganization Plan No. 21 of 1950, 64 Stat. 1273, 1274-1275, § 105(1). *See also* Reorganization Plan No. 7 of 1961, 75 Stat. 840, 842, § 202(b)(1).

The courts have recognized that the authority to amend contracts is inherent in the authority to contract:

> "In general, an officer authorized to make a contract for the United States has the implied authority thereafter to modify it, particularly where, as here, it is in the best interests of the United States to do so." *Whitman* v. *United States*, 110 F. Supp. 444, 450 (Ct. Cl. 1953).

is otherwise expressly denied by the Act or inconsistent with its overall purposes and policies. "[T]he Secretary . . . has broad discretionary authority to deal with the everchanging technological and economic conditions of the commercial shipping industry, as long as [her] actions are reasonable and consistent with the 1936 Act." *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1079 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976).

The district court and the dissent below concluded that the Act's grant of contractual powers includes the amendatory authority at issue here.[12] The panel majority refused to interpret similarly the Secretary's rightful authority under the Act. That refusal is not based on a finding that the Act expressly precludes the contested power: *All opinions below agree that the Act contains no provision that expressly prohibits the permanent release of trade restrictions on a CDS-built vessel.* Nor is the refusal ultimately premised on the content of either or both § 207 or § 504.

---

[12] As the district court and the dissent recognized, and as we discuss in detail *infra* at 61-67, the content and history of § 1104(a)(3) of Title XI of the Act reveal Congress' knowledge, approval and facilitation of the authority challenged here and thus provide substantial, additional support for the Secretary's action. The opinion of the panel majority states that the district court and the petitioners relied upon § 1104(a)(3) as an additional "source" of authority for the Secretary's action. That treatment of § 1104(a)(3) mischaracterizes both the district court's conclusions and the petitioners' arguments.

Rather, the panel majority's crabbed interpretation of these provisions is squarely premised on its interpretation of § 506 of the Act. Prior to examining the sections of the Act discussed above, the panel majority determined that § 506 impliedly bars the permanent release of trade restrictions on a CDS-built vessel. Proceeding from the premise that § 506 constitutes an implicit but specific bar to the action, the panel majority concluded that the more general grants of authority contained in §§ 207 and 504 were insufficient. The conclusion may flow logically from the premise upon which it was based. But that premise is erroneous, as an examination of § 506, its legislative history and its administrative interpretation demonstrates.

C. Section 506 Poses No Bar to the Permanent Release of Trade Restrictions in Consideration for CDS Repayment.

1. *The Language and Logic of § 506 Are Consistent With the Secretary's Action.*

Section 506 [13] of the Act requires owners to agree to operate their vessels in the foreign trades as the

quid pro quo for CDS payment. That agreement is not absolute. Rather § 506 explicitly envisions a CDS vessel's routine involvement in domestic trade incidental to foreign trade in exchange for a proportionate subsidy repayment. In addition, § 506 expressly contemplates that a CDS vessel may spend six months of every year, and thus half its economic life, in direct competition with unsubsidized vessels in the domestic trades. The opportunity for such temporary domestic trading is conditioned upon the owner's

---

[13] Section 506, as amended, 46 U.S.C. § 1156 (1976), states in full:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

remittance of a proportionate amount of subsidy, and the Secretary's determination that the temporary transfer is "necessary or appropriate to carry out the purposes of this Act."

Section 506 is silent on the trading opportunities available to a vessel that once received, but has remitted in full, its subsidy. The provision's focus is more narrow: It addresses only the restrictions that attach as a condition of subsidy receipt and limit the trading opportunities of a vessel that still retains the financial benefits of the subsidy. The language of § 506 simply does not purport to address the conceptually distinct issue of full CDS repayment and permanent trade restriction release.

The panel majority reasoned that the absence of an express grant of such authority indicates a congressional intent to deny the Secretary that power. This conclusion flows from the panel majority's view that the purpose of § 506 is to forge a permanent barrier between Jones Act vessels that have never been subsidized and Jones Act vessels that were at any time subsidized, regardless of subsidy repayment. According to the opinion, "payment of the subsidy stamps indelibly the character of the ship then and thereafter" (Pet. App. at 14a), and marks "the vessel's permanent dedication to U.S. foreign trade." (*Id.* at 16a.) Thus, the panel reasoned, any permissible domestic trading by the vessel subsequent to subsidy receipt is necessarily an exception to § 506's general rule. Designating the incidental and temporary domestic trade allowed by § 506 as express exceptions to the general rule, and invoking the doctrine that enumerated exceptions are exclusive, the panel majority concluded that the permanent release of domestic trade restrictions is implicitly barred by § 506.[14]

[14] The panel majority offered one additional ground in support of its conclusion. Assuming that a finding of market need is an essential prerequisite to the Secretary's approval of a six-month temporary waiver, the panel majority concluded that the Secretary's professed inability to project need in any given market over the 25-year economic life of a tanker militates against the existence of permanent waiver authority. (Pet. App. at 16a-19a.)

The assumption that need is an essential finding for six-month waivers is not supported by the Act itself. Section 506 does not designate market need as the *sine qua non* of temporary waivers, but instead permits the Secretary to exercise the temporary waiver authority when she deems it "necessary or appropriate to carry out the purposes of this Act." Indeed, Congress failed to include in § 506 a requirement proposed in early drafts of the bill that would have conditioned the ability to repay CDS and obtain release from trade restrictions upon a finding of market need or inadequate service. *See, e.g.,* S. 2582, § 504(2), 74th Cong., 1st Sess. (as amended and reported May 24, 1935). The discretionary decision concerning what action "is necessary or appropriate to carry out the purposes of the Act" involves a much broader consideration and weighing of the Act's multiple policy objectives than the panel majority recognized. Market need may well be one appropriate consideration in the Secretary's decisionmaking process concerning temporary waivers under the statute, but it is neither a critical nor a dispositive finding.

Thus the Secretary's inability to make long-term projections of market need is not a decisive factor here. The factor may merit the attention and consideration that it overtly

While superficially neat, the panel majority's reasoning is fully unsatisfactory upon reflection. Section 506 belies the notion that Congress ever intended to establish an absolute and immutable barrier between subsidized and unsubsidized vessels. Indeed the provision itself condones the relatively routine and repeated presence of CDS vessels in the domestic trades. The logic of § 506 argues that Congress intended not to prohibit competition between subsidized and unsubsidized vessels, but to establish a method for assuring that all such competition would be fair. Insofar as incidental domestic trading is concerned, § 506 regards a proportionate subsidy repayment adequate to achieve fairness. Insofar as temporary domestic trade is concerned, § 506 declares a limitation on the time period, the Secretary's approval, and a proportionate CDS remittance sufficient to meet that goal.

The allowances for incidental and temporary trade both assume the vessel's retention of the direct financial advantages of its subsidy. Those exceptions do not address, and thus cannot by implication proscribe, the domestic trading opportunities available to a CDS-built vessel that has disgorged its subsidy to the

---

received in the Secretary's reconsidered decision below. However, to the extent that § 506's description of the discretion involved in granting temporary waivers elucidates that applicable to permanent release, the statute approves the broad consideration of the facts and circumstances surrounding the STUYVESANT that led the Secretary to decide initially, and later to affirm her decision, to accept permanent repayment and to release domestic trade restrictions in this case.

government. The full remittance of CDS strips a vessel of the characteristics of the subsidized fleet and places it on equal footing with the unsubsidized fleet. The return of the CDS deprives the vessel of the government assistance that permits a subsidized vessel to trade profitably in the foreign trade. The repayment of the subsidy imposes the entire construction cost of the vessel upon its builder and owner, and thus places it on a partiy with its unsubsidized counterparts. The vessel that remits its subsidy cannot logically be equated with a vessel that continues to enjoy the substantial and direct economic benefits and trading opportunities that subsidized construction entails.

Moreover, to the extent that it inferentially offers guidance on the question of the permanent release authority, § 506 appears to support the existence of such a power in the Secretary. Agreeing to the domestic trade restrictions is the owner's consideration for the government subsidy. The Secretary's discretionary approval and a proportionate CDS repayment are sufficient under the statute to permit a subsidized vessel to spend half of its economic life in the domestic trades. The logic of the temporary trade allowance suggests rather forcefully that all trade restrictions that attach as a condition of the subsidy's receipt should, in the Secretary's discretion, be terminated in consideration for full CDS repayment. And the legislative history of the provision confirms the integrity of that logical inference.

2. *The Legislative History of § 506 Demonstrates a Congressional Intent to Permit the Permanent Release of Trade Restrictions Upon Full CDS Repayment.*

The relevant legislative history, which includes the Act's pre-enactment history and 1938 amendment,[15] supports two conclusions. First, the Act's framers plainly contemplated, intended and did entrust to the Secretary the authority to release domestic trade restrictions in return for full subsidy repayment. Second, in amending the Act in 1938, Congress articulated no intention to undermine or eliminate that authority. To the extent that the early legislative intent can be discerned, it endorses the Secretary's challenged actions.

a. *The Pre-Enactment History*

The Merchant Marine Act, 1936 replaced an indirect subsidy program with a program of direct subsidies to vessels and operators in the foreign trade. The impetus for the legislative reform was an address delivered to Congress by President Roosevelt in March 1935. The President's address communicated his belief, shaped by an investigative report prepared by a special Senate Committee chaired by

[15] As discussed in some detail *infra* at 61-67, Congress' legislative efforts in this area during the last decade evidence an awareness and approval of the Secretary's authority to release trade restrictions in exchange for CDS repayment and thus are also of significant assistance in resolving the question posed in the instant case.

then Senator Hugo Black[16] and a similar report prepared by the Postmaster General,[17] that the federal loan program for shipbuilding and mail subsidy program in effect at the time had been soundly abused and concededly unsuccessful. To enhance the nation's competitive position and stimulate shipbuilding in American yards, the President recommended the replacement of those indirect subsidy programs with legislation providing direct construction and operating subsidies to vessels and operators in the foreign trade.[18]

The Black Report, which President Roosevelt transmitted to Congress with his address, chronicles in some detail the multiple problems that had arisen in the administration of the mail subsidy program. That program, which had existed in some form since the mid-19th century,[19] provided federal financial assistance to U.S. foreign trade vessels by remunerating them for transporting U.S. mail. One abuse of the program highlighted by Senator Black was the diversion of mail pay funds from use in the foreign trades to use in the domestic trades by operators simultaneously engaged in both trades, a practice

[16] Investigation of Air Mail and Ocean Mail Contracts, S. Rep. No. 898, 74th Cong., 1st Sess. (1935).

[17] H.R. Doc. No. 118, 74th Cong., 1st Sess. at 3-19 (1935).

[18] H.R. Doc. No. 118, 74th Cong., 1st Sess. (1935).

[19] *See* G. Gilmore & C. Black, Jr., *supra* n.2, at 963-966.

which he concluded unfairly discriminated against U.S. operators not eligible for mail pay.[20]

Sensitive to the problems confronting the American merchant marine, the Black Report outlined a remedial legislative plan that recommended separate and direct operating and constructions subsidies. The Report describes the purpose and procedure of the proposed construction subsidy program as follows:

> The purpose of a construction subsidy is to increase the building of ships for foreign trade in American yards by equalizing the cost to American citizens of constructing them in American yards and placing them in operation on foreign trade routes with the costs of constructing the same ships in foreign yards and placing them in operation upon the same routes. The present system of construction loans should be abolished, but the ship operators should be free to borrow from governmental agencies (other than the United States Shipping Board, whose power to make loans should be abolished) upon equal terms and conditions with other private enterprise. The construction subsidy should equal in amount the difference between the cost of similar first-class construction in that foreign yard where construction by the operator is, in the opinion of the agency administering the subsidy, most economically practicable plus an amount equal to that required to place the vessel in operation at a point equal in advantage to that point where it will be placed in operation by an American yard without added cost to the operator and the reasonable cost of American construction.
>
> * * * *
>
> *No vessel, the construction of which is subsidized, should be permitted to operate other than in foreign trade, except with the consent of the agency, and the agency should specifically be denied authority to consent to such operation until there shall have been repaid an amount which bears the same proportion to the construction subsidy theretofore paid as the remaining economic life of the vessel bears to its entire economic life.*[21]

The President's address, the Postmaster General's Report, and the Black Report prompted the presentation of identical bills in the House and Senate on April 15, 1935. Consistent with Senator Black's recommendation, the Act's original sponsors—Senator Copeland, then Chairman of the Senate Commerce Committee, and Judge Bland, then Chairman of the House Committee on Merchant Marine and Fisheries—proposed a program of direct construction subsidies to U.S. foreign trade vessels. Section 504 of these bills [22] authorized the Act's administrators to consent to domestic trading by a CDS vessel, either permanently or temporarily, in exchange for the vessel own-

[20] S. Rep. No. 898, *supra*, n.16, at 14-16.

[21] *Id.* at 43-44. (Emphasis added.)

[22] S. 2582, 74th Cong., 1st Sess. (1935); H.R. 7521, 74th Cong., 1st Sess. (1935).

ers' secured agreement to make a proportionate subsidy repayment.

The House passed its version of the 1936 Act in 1935. Section 506 of the bill enacted by the House [23] authorized the temporary and permanent transfer of subsidized vessels to domestic trade. The House Report that accompanied the bill explained that it expressly contemplated domestic trade by vessels constructed with subsidy assistance:

> The Authority may, on certain conditions, consent to the operation of such a vessel in the domestic trade in which case the amount of the subsidy shall be repaid to the United States proportionately in accordance with the formulas prescribed in Section 506(b).[24]

The Merchant Marine Act did not pass the Senate in 1935. The multiple bills that were presented during the pre-enactment period, and the reports that accompanied them, indicate that the most debated aspect of the CDS repayment issue in the Senate was the extent to which joint domestic and foreign trading would be permissible.[25] As originally proposed and passed by the House, the legislation permitted a subsidized vessel to alternate virtually at will between the foreign and domestic trades. The ability to transfer from one trade to the other was conditioned only upon a percentage subsidy return, the amount of which was tied to the vessel's annual earnings in each trade.

[23] H.R. 8555, 74th Cong., 1st Sess. (introduced by Rep. Bland on June 19, 1935).

[24] H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935).

[25] *See* S. Rep. No. 1721, 74th Cong., 2d Sess. 15 (1936).

Such unrestricted joint coastwise and foreign trade apparently smacked too much of the discredited ocean mail contract system to satisfy the Senate. The language of the early provisions would have allowed the owner of a vessel, who retained the bulk of the financial assistance afforded him to compete in the foreign trades, to skim the cream of the domestic trade and return to the foreign trade to suit his wishes. And, because the amount of subsidy repayment was tied to the vessel's comparative earnings in the two trades, it would have served the subsidized operator's interest to charge less in the domestic trades. Thus, unrestricted joint trade by a subsidized vessel was perceived to carry a significant potential for disadvantaging the unsubsidized fleet.

Section 506 of the bill originally introduced and reported in March 1936 [26] by Senator Copeland responded to this problem by delimiting non-incidental, temporary domestic trade by a subsidized vessel to "emergency" three-month periods. Nonetheless, the bill continued to permit a subsidized vessel's permanent return to the domestic trade upon agency consent and subsidy repayment.

[26] *See* S. 3500, 74th Cong., 2d Sess. (Committee Print, March 3, 1936).

An alternative bill, introduced by Senator Guffey in February 1936,[27] similarly distinguished between the availability of temporary transfers and permanent trade restriction release. Senator Guffey's comments communicate the view of the act's drafters that temporary transfers entail problems of fairness not posed by permanent trade restriction release accompanied by full subsidy payback.

Senator Guffey explained the logic of § 27 of his bill as follows:

> Section 27: This section prohibits the operation of a vessel constructed with the aid of a subsidy for foreign service to be operated jointly in the foreign service and in the intercoastal service. *Provision is made, however, for the transfer of such vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy. This section also provides that the Commission may permit the transfer of a vessel constructed for the foreign service with the aid of a subsidy to the intercoastal service temporarily, for a period not to exceed 3 months, provided an actual emergency exists.* It is believed that under this act the occasion for such transfers will seldom, if ever, arise. Foreign services are being subsidized in order that foreign-flag competition may be effectively met.

[27] *See* S. 4110, 74th Cong., 2d Sess. (1936).

> Intercoastal and coastwise services are developed under the United States flag and are not hampered by foreign-flag services. Any confusion of such services with foreign subsidized services under the United States flag will result, as has been shown in the past, in an unfair advantage of the subsidized lines over the intercoastal and coastwise lines who are competing with each other without the aid of a subsidy. Such unfair advantages may come about by permitting the foreign-service subsidized line to engage, either directly or indirectly, in the coastwise or intercoastal business.[28] (Emphasis added)

He explained additionally the identical purpose of the parallel provision of Senator Copeland's bill:

> The first paragraph thereof states that, except as later provided, no vessel on which a subsidy has been paid shall be operated in other than foreign trade unless the unamortized construction differential is repaid to the Authority prior to transfer to other than foreign service, except in emergencies for periods not exceeding 3 months.[29]

Section 506, as ultimately enacted in 1936, contained the essential terms of Senator Guffey's bill. The original provision stated in full:

[28] Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110, and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 133 (1936).

[29] *Id.* at 124.

It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding costs of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period and such period shall not exceed three months.[30]

[30] Pub. L. No. 74-835, c. 858, § 506, 49 Stat. 1999 (1936).

Responsive to the Senate's concerns regarding the dangers of unrestricted joint foreign and domestic trade, this provision restricted non-incidental temporary domestic trading by subsidized vessels to emergency transfers of no longer than three months. At the same time, however, the provision contemplated and permitted a once-subsidized vessel to return permanently to the domestic trade upon the consent of the agency and an agreement to repay in full its unamortized subsidy. Originally recommended by Senator Black and subsequently proposed by both Senators Copeland and Guffey, the option of a permanent return to the domestic trades in exchange for subsidy repayment was an intentional and integral feature of § 506 of the 1936 Act.

b. *The 1938 Amendment*

In 1938, Congress amended § 506 to read essentially as it does today.[31] The amendment effected three relevant changes in the substance of the provision. First, it clarified the circumstances under which a proportionate subsidy repayment was required. While the original § 506 did not clearly mandate a CDS remittance for incidental or emergency temporary trading, the amended § 506 plainly communicates that obligation. Second, it eliminated the requirement of an emergency for, and the three month limitation on, temporary domestic trading by CDS

[31] Pub. L. No. 75-705, § 18, 52 Stat. 958 (1938).

vessels, and authorized temporary transfer for a maximum of six months in any year. Third, it deleted the language describing the Secretary's permanent release authority.

Although the panel majority tentatively recognized the clear intent of the enacting Congress to permit permanent release of trade restrictions in consideration for CDS repayment, it concluded that the 1938 amendment eliminated that authority. In so reasoning, the panel majority gleaned from the 1938 amendment an intent contrary to that articulated by Congress itself. The 1938 amendment did not diminish the Secretary's contractual powers under Title V but instead confirmed that § 207 extends to the Act's administrators "all the general and implied powers of a business corporation." [32] While the 1938 amendment indisputably resulted in the deletion of the language describing the Secretary's permanent release authority, *the contemporaneous legislative history provides no indication that any member of Congress understood or intended the amendment to eliminate that authority.* Indeed, the legislative history confirms that Congress did not confront, and thus did not intend to eliminate, the Secretary's authority to take the action challenged here. The deletion of the descriptive language was at most the unexplained result of a congressional purpose to effectuate the first two of the three changes made in 1938.

---

[32] H.R. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

In 1937, Joseph P. Kennedy, then Chairman of the Maritime Commission, proposed a series of revisions to the 1936 Act. His recommendation included a proposal to rewrite § 506 which he believed necessary to eliminate "ambiguities and confusion" in the original proposal. Mr. Kennedy's remarks on the legislation in congressional hearings included the following explanation of the proposed § 506 amendments:

> "Section 506 has been entirely rewritten to remove ambiguities and confusion. The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine.
>
> As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.

> If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year. If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be determined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy.
>
> It is believed that the section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.[33]

The panel majority laboriously dissected the first paragraph of Mr. Kennedy's comments to extract an intention on his part to foreclose all domestic trading by CDS-built vessels with the exception of the enumerated incidental and temporary options. In order to discern this intent, the opinion first concluded that the original § 506 was arguably unclear on the question of permanent waiver authority. It then labeled that issue as the ambiguity upon which Mr. Kennedy centered and inferred from his comments a purpose to foreclose the opportunity for permanent

[33] Amending Merchant Marine Act, 1936: Hearings on H.R. 8352 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d and 3d Sess. 8-9 (1937-1938).

trade restriction release. Finally, the panel majority perfunctorily attributed to the amending Congress the purpose it ascribed to Mr. Kennedy.

Our response is threefold. First, the notion that the original § 506 was ambiguous on the issue of permanent trade restriction release strains credibility.[34] While the provision was unclear in certain respects, the lack of clarity did not involve the availability of permanent trade restriction release. The original section plainly and expressly authorized three types of domestic trading by a CDS-built vessel: (1) domestic trade incidental to foreign trade, as defined by the exception for round-the-world voyages and island stops in the course of foreign trade, (2) permanent domestic trading upon agency consent in exchange for an agreement to repay fully the vessel's unamortized subsidy, and (3) temporary domestic trading upon agency consent for emergency, three-month periods. What the original § 506 did not make clear was whether a vessel that engaged in incidental or temporary domestic trade had an obligation to repay a proportionate part of its CDS: The original section could be read to exempt the incidental trading option from any repayment obligation and to require no CDS return for temporary transfer.

[34] The panel majority itself notes the implausibility of this notion and the fact that none of the parties below urged such a construction of the original statute. (*See* Pet. App. at 23a n.44.)

Second, when Mr. Kennedy's remarks are read in full against the text of the statute to which they refer, it is by no means clear that the majority panel correctly grasped their import. Diagramming the final sentence of the first paragraph of the comments convinced the panel that Mr. Kennedy had identified as ambiguous, and wished to clarify by eliminating, the opportunity for permanent trade restriction release in exchange for CDS repayment. Given the original provision's clarity on that point, this interpretation is curious. Moreover, were the panel majority correct in identifying Mr. Kennedy's primary objective, one would expect to find in his comments some reference to the concept of permanent trade restriction release. There is none. The next three paragraphs of Mr. Kennedy's remarks—which the panel majority ignored entirely—explain only the clarified requirement of partial CDS repayment in return for incidental and temporary domestic trade. The fact that Mr. Kennedy confined his descriptive remarks to the subject that actually was unclear in the original § 506 undermines the panel majority's view of his intent. His remarks, which the opinion below deemed so significant, are at best ambiguous.

Moreover, even assuming that Mr. Kennedy's objective was to bar permanent trade restriction release, the relevant reports of the House and Senate provide no indication that either house of Congress shared that intent. The panel majority's assertion

that Mr. Kennedy's "explanation . . . was incorporated almost verbatim into both the House and Senate reports which accompanied the bill amending § 506 in 1938 . . ." (Pet. App. at 26a) is demonstrably incorrect. The congressional reports focus, clearly and exclusively, upon the perceived need to state unambiguously the requirement of proportionate CDS repayment upon incidental and temporary domestic trade by a CDS vessel.

The Senate Report offers the following explanation of the purpose of the 1938 amendment:

> The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade or in other enumerated voyages to foreign ports, which may include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These provisions are definite. *The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the con-*

struction-differential subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months.

As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports en route to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period.

It is believed that the section, as rewritten, will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.[35] (Emphasis added.)

The Senate Report does use language similar in many respects to that used by Mr. Kennedy. Yet, most significantly, the report does not duplicate the ambiguous Kennedy sentence upon which the panel majority placed so much emphasis. Instead, the cor-

[35] S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938).

responding section of the report defines the primary difficulty with the original § 506 as the uncertainty whether proportionate CDS repayment is required for the incidental domestic trading permitted by the statute.

The House Report similarly explained its objective and expressly disclaimed any intent to work a fundamental change in the original § 506:

> Section 506 deals with the services upon which vessels which have been built with a construction-differential subsidy may operate and provides for the repayment of proportions of the subsidy in case the vessel is used otherwise. The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. *As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade, and, if the vessel is operated in the domestic trade on certain definitely stated services, to repay certain proportions of of the subsidy. If the vessel is used, with the consent of the Commission, in the domestic trade in services other than those enumerated, the obligations of the owner to repay part of the subsidy are clearly defined.*
>
> *No fundamental change in the original purpose of the section has been affected.*[36] (Emphasis added.)

[36] H.R. Rep. No. 2168, *supra* n.32, at 21.

These reports join in identifying the problem that prompted the amendment as the lack of clarity on the repayment requirement for temporary and incidental transfers. They contain none of the ambiguous language upon which the panel majority seized to ascertain Mr. Kennedy's intent. The reports indicate that Congress perceived the amendment to have two, and only two, purposes—the expansion of the temporary waiver option and the clarification of the requirement of CDS repayment for both incidental and temporary transfers. They neither state nor intimate that Congress perceived its amendment as affecting in any way the permanent release authority extended the agency in 1936.

The unsubsidized operators who testified against the proposed 1938 amendment apparently shared Congress' ignorance that the amendment could ever be read to foreclose the permanent release of trade restrictions. Indeed, one unsubsidized operator urged Congress to delete § 506 entirely and enact instead a provision incorporating what the majority panel extended here—the permanent bar from the domestic trade of a vessel originally built with CDS, regardless of CDS repayment. Edgar C. Luckenbach, the president of an unsubsidized carrier, testified in 1937 in vigorous opposition to both the original § 506 and the 1938 amendment. He proposed instead that "in the interest of the intercoastal service as a whole § 506 of the bill 3078 should be deleted from the bill and an amendment substituted *prohibiting subsidized vessels and vessels which have at any time been subsidized from the intercoastal service.*" [37] Mr. Luckenbach's recognition of two distinct categories of vessels once assisted by CDS—those that retain their subsidy and those that have repaid their subsidy—is unmistakable. But Congress did not honor this request. Instead, it enacted in 1938 an amendment that substantially expanded the temporary domestic trading opportunities of vessels that continue to enjoy the benefits of the subsidy.

A close analysis of the available 1938 history indicates that, to the extent that Mr. Kennedy may have envisioned a bar to permanent transfer, his view was neither articulated nor shared by the affected industry or the Congress. The dissent below correctly observed that "nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938." (Pet. App. at 55a.) (Footnote omitted.) The majority panel's interpretation of Mr. Kennedy's hearing comments—which contradicts the intent expressed by the enacting Congress and was never adopted by the amending Congress—is an extraordinarily weak basis for its conclusion that Congress effected the major statutory revision at issue here, particularly since

---

[37] **Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committee and on Education and Labor, Part I, 75th Cong., 2d Sess. at 44 (1937). (Emphasis added.)**

Congress in 1938 disclaimed any intent to work a fundamental change in the section's original purpose.[38]

The language and structure of the Act militate against the conclusions of the panel majority. The early legislative history of the Act invites the Secretary's exercise of the powers challenged here and the 1938 amendment provides no tenable basis for concluding that Congress intended to revoke that invitation. The fact that none of Mr. Kennedy's contemporaries shared the views that the panel majority attributes to him casts doubt upon the correctness of its reading of his comments. That doubt is magnified upon consideration of the agency's interpretation. For, if the panel majority correctly understood the substance of his 1937 remarks, Mr. Kennedy stands as the lone dissenter to an otherwise uniform view of the Secretary's powers under the Act.

D. The Permanent Release of Domestic Trade Restrictions in Exchange for Full CDS Repayment is Supported by a Longstanding and Consistent Agency Interpretation that Congress Has Knowingly Affirmed.

The Secretary's decision to amend the STUYVESANT's CDS contracts to permit its unrestricted domestic trading in consideration for full CDS repayment comports with a reasonable, consistent and relatively longstanding agency interpretation that

---

[38] **H.R. Rep. No. 2168, *supra* n.32, at 21.**

was brought to the attention of and affirmed by Congress in 1972. This community of administrative and congressional action merited, under elementary principles of statutory interpretation, a judicial deference withheld by the panel majority. *See, e.g., Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, —— U.S. ——, 47 U.S.L.W. 4048, 4052 (December 11, 1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969).

1. *The Grace Line Precedent*

The Secretary first exercised the amendatory powers at issue here in response to an application made by the carrier Grace Line, Inc. in 1964. At that time Grace Line owned two vessels that had been converted from cargo vessels to container vessels with the assistance of CDS in the late 1950s. By 1964, Grace Line concluded that the vessels could not be successfully operated in the foreign trades. As a result, the company requested the Secretary to accept the full return of the unamortized subsidy and to amend the vessels' CDS contracts to remove the domestic trade restrictions. (App. at 172-173.)

Grace Line's request prompted the first recorded agency analysis of the question whether the Secretary has the contractual powers at issue here. The question was at that time studied and answered affirmatively by both Graydon L. Andrews, Acting General Counsel for the Maritime Administration, and the Comptroller General of the United States. In

a memorandum dated July 28, 1964, Mr. Andrews concluded that the agency possessed the discretionary legal authority to grant Grace Line's request. He offered several bases for his conclusion. First, noting that the § 506 repayment requirement for temporary trading terminates with the vessel's economic life, he analogized the Grace Line proposal to a request to "accelerate" the vessel's release from its § 506 restrictions. Second, examining the original language of § 506 and the history of its subsequent 1938 amendment, he gleaned no congressional intent to bar the permanent release of trade restrictions in exchange for the repayment of the vessel's unamortized CDS. Finally, he determined that the discretionary exercise of such authority would parallel the logic and objectives of Title V. (App. at 350-358.)

The Secretary of Commerce thereafter inquired whether the Comptroller General agreed with that interpretation of the statute. The Opinion of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964), concurred that "the Maritime Subsidy Board has the legal authority to amend the two contracts involved to remove therefrom the Section 506 provisions . . . upon repayment to the Government of the unamortized construction-differential subsidy. . . ." (App. at 172, 180.) The Opinion similarly analyzed the statutory scheme and relevant legislative history, and concluded that § 506 poses no barrier to the permanent release of domestic trade restrictions. In

addition, the Comptroller General joined the agency view that subsidy repayment eliminates the financial advantage that would otherwise warrant the restrictions, and thus supports their release:

> Under the law an American operator in the domestic service is required to build his ship in an American shipyard and is required to pay the full domestic price of his ship. *An operator, aided with a Title V construction-differential subsidy, secures his ship at a cost equivalent to a foreign price* (domestic price less the subsidy granted by the Government) *and, as a result thereof the operator is required by Section 506 to, in effect, pay the domestic price if the ship is operated in the domestic trade. This is accomplished by a repayment to the Government of the subsidy applicable to that proportion of the vessel's statutory life during which it is operated in the domestic trades. Upon the basis of the rationale for the repayment of subsidy,* it appears that if the Government receives the full benefit of its subsidy by the owner's operations in the foreign trade and the compliance with the other construction-differential subsidy contract obligations for the statutory life of the vessel, *or if, in the case of a vessel which has not reached the end of its statutory life, the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel; that is, he should not be required to make further repayments and should not be bound to operate the vessel exclusively in foreign trade.* This conclusion appears amply supported by the

> above-quoted portions of Senate Report No. 1618, 75th Congress, 3d Session, and that the repayment of unamortized subsidy will protect the interests of the Government and those of the carriers, both foreign and domestic.

(App. at 179-180.)

The *Grace Line* opinion plainly evidences the agency's considered view of its powers under the Act. That interpretation had been consistently, albeit sparingly, reaffirmed by the Department in the intervening period before the STUYVESANT decision. The second and third such applications were prompted by the expectation that the trade route between the United States and the Virgin Islands might be reclassified as a domestic trade area.[39] In 1976 and 1977, Atlas Marine Company and Aquarius Marine Company, carriers whose CDS vessels were employed in the U.S.-Virgin Islands trade, sought the agency's conditional consent to full subsidy repayment and trade restriction release in the event of such a re-

[39] Section 21 of the Merchant Marine Act of 1970, 46 U.S.C. § 877, excludes the Virgin Islands from the "coastwise laws of the United States until the President shall . . . declare that such coastwise laws shall extend to the Virgin Islands . . . ." Thus, for purposes of the Jones Act and the CDS program, the Virgin Islands are a foreign port. The concern of these applicants is explained by the fact that repeated legislative efforts have been made to repeal the Virgin Islands exemption over the last decade. *See American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156, 1164 n.43 and 1167 & n.59 (D.C. Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 2161 (1979).

classification. The agency's approval of the requests comports with *Grace Line*. (*See* App. at 164-165.)

In 1977, as a result of a change in trading opportunities, Wilmington Trust Company sought to obtain release from § 506 restrictions on two liquid natural gas tankers by remitting their CDS on the date of the vessels' delivery. The release was requested in that case to permit the vessels' employment in non-U.S. foreign trades, and the applicant urged that its application was theoretically indistinguishable from that made by Grace Line in 1964: "[A] party may repay CDS, in whole or in part, not only for the purpose of removing any Section 506 of the Act restriction on a vessel, but also for removing all restrictions and obligations imposed by Title V of the Act. . . ." (Rec. at Doc. 34, Exh. A at 12; *See* App. at 164-165.) The Secretary's approval of this application again reaffirmed the *Grace Line* precedent. For the fourth time, the agency followed the *Grace Line* principle that full subsidy repayment eliminates the justification for the trade restrictions and renders their release both legal and equitable.

The panel majority's deprecatory finding that "[t]he Grace Line affair . . . is no precedent for what the Agency has attempted to do here" (Pet. App. at 30a) (footnote omitted) is extraordinary. None of the three arguments offered in its support is persuasive.

The panel intimates that the absence of objection or judicial challenge to the 1964 *Grace Line* decision

undercuts its value. It is apparently true that the Secretary's approval of Grace Line's request created no industry furor, but that fact does not advance an inquiry into the duration, consistency, meaning or reasonableness of the 1964 opinion. At best the absence of prior challenge suggests that the Secretary's invocation of the permanent release authority was not deemed controversial until it involved a trade area that the respondents' here perceive as their own special reserve.

The panel majority additionally suggests that its ability to draw distinctions among the facts in the five repayment-and-release actions somehow renders *Grace Line* irrelevant. Since similar cases invariably entail factual distinctions, a finding of such differences is thoroughly unremarkable. The important question in examining agency precedent is whether the treatment of similar situations reveals a consistent principle underlying the Act's administration.

The immaterial factual differences isolated by the panel majority in no way detract from the agency's consistent, principled exercise of authority in the five permanent release cases. Over the course of the Act's administration, the Secretary has received applications to remit CDS paid to assist both initial construction costs, as in the case of the Atlas, Aquarius, Wilmington Trust, and Polk vessels, and reconstruction costs, as in the case of Grace Line.[40] Those applications have involved both vessels newly entering commerce, such as the Wilmington Trust and Polk vessels, and vessels already plying the seas, as were the Atlas, Aquarius, and Grace Line vessels. Each time the applicant pointed to a change in trade conditions that vitiated its prior commercial plans for the vessel, offered to remit the financial advantage that it held as a result of the subsidy, and requested

[40] The majority panel emphasizes that, unlike the STUYVESANT, the Grace Line vessels' original construction was not subsidized. The opinion suggests that the release of trade restrictions on a vessel reconstructed with CDS is more acceptable than the same action with respect to a vessel initially constructed with CDS. It reasons that, because Grace Line's vessels were originally constructed without subsidy, unsubsidized owners took their presence in the trade into account when making construction plans, and their return to the domestic trade did not therefore thwart the expections of other domestic operators. The opinion freely admits that this view depends upon the majority panel's view of the purposes and policies of the Act. (Pet. App. at 30a-31a). We treat the panel majority's misperception of the Act's fundamental objectives at 67-75 *infra* and will not, therefore, digress here.

However, three responsive points can appropriately be made at this juncture. First, the logic of *Grace Line* is not in any way tied to or dependent upon the fact that the vessels were not initially constructed, but only reconstructed, with CDS. Second, the panel majority's suggestion that the availability of trade restriction release might reasonably depend upon the point in the vessel's life at which the CDS is paid directly undermines the opinion's central premise that § 506 restrictions attach—permanently and immutably—with the receipt of CDS. *See supra* at 26. Third, while the original Grace Line vessels were cargo vessels, the reconstructed vessels were container vessels equipped for much different service. To the extent that one made predictions concerning the domestic container vessel market, the original cargo vessels *would not* have fallen within those projections.

a reciprocal release of § 506 restrictions. The Secretary's affirmative response to these applications has unmistakably confirmed her interpretation of her powers under the Act, reiterated her view that subsidy repayment creates the parity intended by the Act, and established an intelligent and intelligible precedent.

The panel majority questions the consistency of the *Grace Line* interpretation. While it grudgingly recognizes the consistency of the agency's approach to the five applications that it has received (Pet. App. at 34a), the panel majority claims to find an inconsistent view expressed by the agency's former General Counsel in 1970.

The 1970 memorandum considered the legality of including in the original CDS contracts for two earlier Seatrain vessels (not the STUYVESANT) a provision sanctioning future repayment and release. The memorandum reveals that its author (1) interpreted the statute to entrust to the Secretary the authority for permanent trade restriction release upon CDS repayment, and (2) counseled against the agency's making an advance, unconditional commitment to exercise that authority in contracting to pay the subsidies for any vessel. (App. at 359-363.) The memorandum explains:

> While it is acknowledged that this opinion and concurrence therein [*Grace Line*] did permit the lifting of the section 506 restriction from existing ships in a particular instance, *it would appear inconsistent with the basic purpose of*

> *CDS* to build ships for the U.S. foreign trade *to consider an application for CDS based on initial acceptance of the premise that at any time after the building of the ships, the operator might obtain a release from the section 506 restrictions by repayment of unamortized CDS.* Furthermore, since the opinion and concurrence related to the authority of the Board to amend contracts, it would be necessary to establish in any particular instance that some consideration would flow to the Government as an integral part of an amendment lifting the section 506 restrictions. *To approve an application for CDS on the basis proposed by Seatrain would, in effect, bind future Boards to exercise a discretionary authority without any regard for whether, in the future, the Government would receive adequate consideration in exchange for the lifting of the restrictions. The consequence of Seatrain's proposal, if accepted, would be to convert a matter of future exercise of discretionary authority by the Board into a present right of Seatrain, at its option, to lift the restrictions by CDS repayment.*

(App. at 362.) The memorandum thus does not question the principle of CDS repayment and trade restriction release, but deems a blind promise to exercise it at the subsidized owner's option to be inconsistent with the discretionary nature of the Secretary's power. Fairly interpreted, the memorandum is entirely consistent with the agency's views expressed on the matter since 1964.

Finally, the panel majority asserts that the analytical differences between the Comptroller General's opinion and the opinion of the district court below warrant discarding *Grace Line* as precedent. The panel appears to reason that where different but complementary approaches lead to the same conclusions, both approaches and the result are fatally suspect. The conclusion is baffling.

Grace Line assumes the existence of ample amendatory authority in the Secretary and focuses primarily on the question whether § 506 poses any bar to its exercise in connection with CDS repayment-and-permanent release. The district court found that § 506 itself offered no dispositive assistance and thus looked beyond that provision to other indicia of congressional intent—including §§ 207 and 504 of the Act, the structure and overriding policies of the Act, the administrative interpretation of the Act, and Congress' affirmation of *Grace Line* in 1972. These complementary lines of analysis led the Comptroller General and the district court to conclude identically that (1) § 506 does not proscribe the administrative action challenged here, and (2) the discretionary exercise of that authority is consistent with the Act's structure and policy objectives. The fact that two different but compatible analyses led to the same conclusion reinforces, rather than undermines, the validity of the *Grace Line* precedent.

2. ***Congressional Affirmation of the Grace Line Precedent.***

In declining to defer to the agency's longstanding view of its authority under the Act, the panel majority refused to weight either the implicit or explicit congressional approval of the *Grace Line* precedent. The majority opinion asserts that the actions of Congress following *Grace Line* fail to demonstrate congressional approbation of the agency interpretation. A review of the subsequent legislative activity reveals that the panel majority was badly mistaken.

Six years after *Grace Line*, Congress amended the Act including Title V in some detail, leaving intact the agency's 1964 interpretation of its Title V powers.[41] While the 1970 history alone could dispositively support a finding of congressional affirmation, *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965) and cases cited therein, Congress' approval of *Grace Line* need not merely be implied from the 1970 amendment. For, in amending Title XI of the Act in 1972, Congress considered and expressly facilitated the exercise of the Secretary's *Grace Line* authority.

The 1972 Title XI amendments [42] were designed to improve the Act's responsiveness to the financing needs of the shipbuilding industry and to simplify the mechanics of issuing and marketing obligations. Among the proposed amendments was a new section

[41] *See* Pub. L. 91-469, 84 Stat. 1018 (1970).

[42] Federal Ship Financing Act of 1972, Pub. L. 92-507, 86 Stat. 909.

that extended the availability of federal financing guarantees to *Grace Line* CDS repayments. As introduced in the House by the then Chairman of the Committee on Merchant Marine and Fisheries, the proposed section read:

> Sec. 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> * * * *
>
> (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, *in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions*; . . . .[43]

The plain words of this proposed section note and accept the Secretary's discretionary authority to accept CDS repayment in exchange for the release of § 506 restrictions. Indeed, the section facilitated such action by authorizing the extension of government

[43] H.R. 9756, 92d Cong., 1st Sess. 7-8 (1971) (Emphasis added.)

financing guarantees to assist full subsidy repayment.

The section was ultimately not enacted in the form in which it was originally proposed. Prior to the bill's passage, the language that expressly referred to a CDS repayment made in order to obtain release from trade restrictions was omitted, leaving the more general reference to "financing, in whole or in part, the repayment of any amount of construction differential subsidy" that now appears in the Act.[44] This amendment responded to a concern expressed by the Department of Commerce that the financing guarantees should be made available *not only* for the total CDS repayments contemplated by the bill *but also* for partial CDS repayments not mentioned in the proposed section. By his October 29, 1971 letter to the House Committee chairman, the then General Counsel of the Department of Commerce explained:

> The proposed legislation would also permit the Secretary of Commerce to guarantee or to make a commitment to guarantee payment of the principal of and interest on an obligation which aids in financing in whole or in part the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. This provision in Title XI does not in any way extend or affect the application of Title V of the Act. As drafted, the language

[44] The complete text of § 1104(a)(3) is set forth in the Addendum at 20a-21a.

> of the bill would preclude the use of Title XI assistance from being available for repayment of construction-differential subsidy in cases where only a partial repayment is being made. This restriction is unnecessary, and that language should be modified accordingly.[45]

In amending the bill to correspond with the Department of Commerce views, Congress explained that its purpose was to expand the coverage of the section. The explanation offered by the House Report expressly notes the *Grace Line* precedent and communicates Congress' intent to facilitate the exercise of the power through the extension of federal financing guarantees:

> Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessels from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." *In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Sec-*

[45] H.R. Rep. No. 688, 92d Cong., 1st Sess. 17 (1971).

> *retary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee* questions the desirability of general legislation to deal with such an unusual situation, and *feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act.* Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act.[46]

Congress' action in connection with the 1972 amendments supports several conclusions. First, it indicates at a minimum that Congress was made aware of the Secretary's *Grace Line* interpretation and failed to take legislative action to disapprove that view. Second, the commentary in the cited report can be reasonably read only to accept and approve the existence of such discretionary authority in the Secretary. As the dissent below so aptly notes, Congress' avowed intent to effectuate no change in Title V was made against the background of its understanding that the title embraces the *Grace Line* precedent. (*See* Pet. App. at 58a.) Third, in enacting § 1104 (a)(3), Congress escalated its approval of *Grace Line* into a financing provision that actually facili-

[46] H.R. Rep. No. 688, *supra* n.45, at 9-10.

tates the exercise of the discretionary authority at issue here.

The pattern of administrative and congressional action that preceded the Secretary's 1977 decision concerning the STUYVESANT is entitled to great weight in the judiciary's interpretation of the Act. This Court's analysis of a similar consensus between the agency and the Congress in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-82 (1969) obtains:

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

(Footnotes omitted.) *See also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The agency interpretation must be affirmed unless it is unreasonable, *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), or there are "compelling indications" that it is incorrect. *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

Judicial deference to an agency's construction of its statutory mandate is appropriate "particularly

when [the disputed agency] construction accords with well established congressional goals." *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, —— U.S. ——, 47 U.S.L.W. 4048, 4053 (December 11, 1978). As the district court and the dissent below recognized, the existence of the *Grace Line* authority in the Secretary and her exercise of that authority in 1977 on the STUYVESANT's behalf accord with and promote the fulfillment of the Act's fundamental policy objectives.

E. The Challenged Action of the Secretary Is Fully Supportive of and Consistent with the Act's Fundamental Policy Objectives.

The decision of the panel majority proceeds from its fundamental belief that the unsubsidized owner needs, is entitled by statute to receive, and has relied upon freedom from any competition with CDS-built vessels. The 40-year history of the Act contradicts this anticompetitive approach. The express and overriding purposes of the Act declare a policy of fortifying and increasing the number and competitive abilities of Jones Act vessels in both the United States domestic and foreign trades. The language and legislative history of the Act, particularly that of § 506, reveal no generalized congressional intent to bar competition between the subsidized and unsubsidized fleets but instead evince a purpose only to assure that all such competition would be fair.

Congress recognized the potential for unfair competition between subsidized and unsubsidized vessels

under circumstances where the retention of the subsidy could afford a material competitive advantage. To eliminate unfair competition, § 506 exacts the price of domestic trading restrictions for the subsidy benefit. The full disgorgement of the subsidy, however, eliminates any unfair advantage that a CDS-built vessel might otherwise have. Indeed, as the dissent below aptly observed:

> Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator. The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as a whole, to protect Jones Act operators from this type of competition.

(Pet. App. at 59a.) (Footnotes omitted.)

The panel majority misapprehends the Act and its history by reading into them a purpose never intended or expressed—the isolation of subsidized and unsubsidized vessels into two "completely separate competitive areas." (Pet. App. at 50a.) The majority created an unfounded antagonism between the Jones Act and the Merchant Marine Act, 1936, and failed to grasp their similar purposes. Neither statute was intended to insulate permanently the unsubsidized Jones Act vessels in the coastwise trade from competition by Jones Act vessels subsidized under Title V.

The two statutes combine to effectuate the "historic congressional purpose to aid shipbuilding interests" in this country. *See Pennsylvania Railroad Co.* v. *Dillon*, 335 F.2d 292, 296 n.5 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964) and *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1083 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976). As stated in *Dillon*, the Jones Act was "not intend[ed] to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." [47] 335 F.2d at 295-296 & n.5. And Title V of the Merchant Marine Act, 1936 does not forbid competition within the coastwise trade; it expressly permits such competition so long as it is fair.

The Jones Act reserves United States domestic trade for U.S.-built, owned and documented vessels. The STUYVESANT satisfies all requirements of the Jones Act. The Merchant Marine Act, 1936, established a system for subsidizing U.S.-built and operated vessels in the foreign trade with the express objective of increasing the overall strength of the national merchant marine. All of the Act's multiple purposes, *including the protection of the unsubsidized owner from unfair competition*,[48] were served by the Secretary's decision concerning the STUYVESANT.

[47] Petitioners unsuccessfully challenged the standing of the plaintiffs in both the district court and the court of appeals and have not raised that issue here.

[48] At the direction of the district court on remand, the agency reconsidered its decision admitting the STUYVE-

The STUYVESANT became available to alleviate a short-fall of tonnage in the domestic Alaskan oil trade while it had been unmarketable in the United States foreign trade. The STUYVESANT remains capable of responding in a military emergency. The STUYVESANT continues to be owned and operated under the United States flag by United States citizens. The STUYVESANT is a safe vessel constructed in the United States and manned by trained, efficient United States personnel. The STUYVESANT's construction and the Secretary's financial aid to the shipyard made a significant contribution to the existence of domestic facilities for shipbuilding and repair. Finally, as an added advantage of the decision, the revenues generated by the sale and charter transaction permitted the repayment of debt guaranteed by the government and protected the collateral for the government's outstanding loans and guarantees.

The purposes of the Act are not furthered, and indeed are thwarted, by the profoundly anti-competitive view advanced by the panel majority. At the time that the Secretary agreed to amend the STUYVESANT's CDS contract, the supply of unsubsidized tankers available to transport Alaskan oil was insufficient to meet Alaskan production. The Department of Commerce projected that the short-fall of supply would continue at least throughout the three years of the STUYVESANT's charter with SOHIO, and that even the STUYVESANT's employment would not fully meet the extant or expected demand. (App. 581-584.) At the same time, the supply/demand imbalance had prompted opportunistic conduct on the part of unsubsidized owners and operators. For example, despite SOHIO's expressed interest, respondent Shell Oil Company failed to make its vessels available for charter until after SOHIO completed charter arrangements with the STUYVESANT and did so at that time at rates that SOHIO averred were 60-70% above competitive market rates and "could be considered unconscionable." (App. at 162.) It is inconceivable that the Act would license the unsubsidized owner's exploiting a demand/supply imbalance in the domestic trades while an American-built, owned and operated vessel that poses no unfair competitive threat in the domestic trade[49] is relegated to layup.

SANT to the domestic trade with particular focus on the competitive impact of the vessel's entry on that trade. The agency invited and received comments from interested parties, including the respondents in this case. The conclusion reached in the agency's 37-page opinion was that the competitive effect of accepting CDS repayment under the approved terms and of allowing the STUYVESANT to engage in the Alaska trade is "none or minimal." (App. at 568-569.)

[49] Initially and upon appeal, the corporate respondents additionally challenged the Secretary's decision to accept CDS repayment from Polk through a 20-year, interest-bearing and secured promissory note payable in level semiannual installments on the ground that it permitted unfair competition. The panel majority found it unnecessary to reach the issue in light of the disposition of the case. The district court

In extending such commercial privilege to the respondents, the panel majority unduly credited their dramatic claims of surprise at the Secretary's action and of reliance upon the absence of permanent competition with vessels constructed with CDS assistance in the Alaskan oil trade. The possibility of full or part time competition with CDS-built vessels has been widely recognized by the industry for years. The Comptroller General's decision in *Grace Line* was a public document published in the legal literature. In hearings on the 1972 amendments, James J. Reynolds, the President of the American Institute of Shipping explained the industry's knowledge and acceptance of the Secretary's *Grace Line* powers:

---

determined that prescribing the terms and conditions of CDS repayment is a matter properly delegated to the Secretary's discretion.

Petitioners submit that the district court's resolution of this issue accords with the discretionary authority afforded the Secretary under the Act and properly recognizes the Secretary's expertise in matters of maritime finance. The remand in this action proves the practical wisdom of the district court's conclusion. The government experts at MarAd and MSB, knowledgeable in the intricacies of maritime financing and charter hire rates, examined the transaction in light of all plaintiffs' claims of unfair competition and determined with assurance that the competitive effects of the repayment terms were "minimal or nil." (App. at 589-596.) Repaying the $27.2 million over 20 years with interest from the date of the release of trade restrictions places the STUYVESANT in a competitive position comparable to any other operator servicing a construction debt.

> The bill would also authorize the use of title XI guarantee in financing repayment to the Government by a shipowner of construction-differential subsidy received in the construction of a vessel in order to free it from all restrictions imposed as a result of the subsidy.
>
> For instance, if a vessel was built with construction-differential subsidy and the owner wishes to buy out the subsidy in order to qualify it for other types of activities, the transaction could be financed under the bill so that he could buy out the subsidy and make the vessel eligible for other services which would be consistent with the objectives of the whole natural program.[50]

This spirit of industry approval of and acquiescence to the bill was reflected in the Committee Chairman's comment: "I do not believe that this is a controversial bill and am unaware of any opposition to it." [51]

The claims of reliance to which the panel majority responded are no more creditable than the claims of surprise. First, given the established *Grace Line* precedent, any reliance by an unsubsidized carrier on an immutable right to be free of permanent competition in the Alaskan oil trade from a vessel once assisted by CDS was misplaced. Second, in light of the § 506 provision for the continual, temporary pres-

---

[50] Proposed Amendments to the Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. at 225 (1971).

[51] *Id.* at 193.

ence of CDS vessels in the domestic trades, any projection that failed to consider competition from CDS vessels was faulty. Third, and most important, the panel majority assumed a degree of foreseeability in the domestic shipping trade that the facts involved in this case belie. In undertaking to construct vessels in anticipation for the Alaskan oil trade, no owner or operator could have projected the volume of trade that has in fact arisen in that market. The events that swelled the demand for tankers in Alaska were as unforeseeable as those that depressed the foreign market for such vessels. (*See* Pet. App. at 9a-10a.) It is the corporate respondents' desire to reap the benefit of fortuity, rather than to protect a reliance interest, that truly underlies this litigation.[52]

The respondents, through this action, have strived vigorously to preclude the entry of a new competitor into the important Alaskan oil trade. The efforts of the respondents here parallel the requests made of Congress by unsubsidized operators in 1938. Only the result reached by the court of appeals is different. The decision of the panel majority awards the un-

[52] Despite the panel majority's protestation that recognizing the Secretary's rightful authority would result in uncertainty, the district court's judgment below actually served the interests of increased predictability. The district court's decision prompted the Secretary to undertake the promulgation of regulations to govern the future exercise of the permanent release authority. *See* 43 Fed. Reg. 51045 (November 2, 1978). That undertaking has apparently been deferred pending the final resolution of this case.

subsidized Jones Act owners the permanent monopoly in the domestic trades that Congress in the past refused to sanction.

The Merchant Marine Act, 1936—as originally enacted and amended by Congress, as interpreted by the agency, and subsequently affirmed by Congress—affords the Secretary the necessary authority to respond to the extraordinary confluence of factors that prompted and support her STUYVESANT decision. The repayment of the CDS satisfies the congressional requirement of fairness embodied in the Act. The employment of the vessel, the safeguarding of the federal guarantees and loans, and the assistance to the shipyard respond directly to the Act's overriding and fundamental goals to foster and maintain an efficient national merchant marine. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the [Secretary's] broad responsibilities . . . demand a generous construction of [her] statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (Citations omitted). The decision of the panel majority undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court of appeals, and hold that the Merchant Marine Act, 1936 authorizes the Secretary of Commerce to amend a CDS contract to remove domestic trade restrictions on a vessel constructed with the assistance of a government subsidy in consideration for full CDS repayment.

Respectfully submitted,

JOHN W. VARDAMAN, JR.
WILLIAM E. MCDANIELS
JANE E. GENSTER

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

NEAL M. MAYER

COLES & GOERTNER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JONATHAN BLANK

PRESTON, THORGRIMSON, ELLIS, HOLMAN & FLETCHER
919 - 18th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

August 16, 1979

ADDENDUM

ADDENDUM

STATUTORY PROVISIONS INVOLVED

THE MERCHANT ACT, 1936, as amended, 46 U.S.C. §§ 1101 *et seq.* (1976)

Title I, § 101 of the Act, 46 U.S.C. § 1101 .... 2a

Title II, § 207 of the Act, 46 U.S.C. § 1117 .... 2a

Title II, § 210 of the Act, 46 U.S.C. § 1120 .... 3a

Title II, § 211 of the Act, 46 U.S.C. § 1121 .... 4a

Title II, § 212 of the Act, 46 U.S.C. § 1122 .... 6a

Title V, § 501 of the Act, 46 U.S.C. § 1151 .... 9a

Title V, § 502 of the Act, 46 U.S.C. § 1152 .... 11a

Title V, § 504 of the Act, 46 U.S.C. § 1154 .... 18a

Title V, § 506 of the Act, 46 U.S.C. § 1156 .... 19a

Title XI, § 1104(a) of the Act, 46 U.S.C. § 1274 (a) 20a

Section 27 of the MERCHANT MARINE ACT OF 1920, as amended, 46 U.S.C. § 883 (Supp. 1979) ("Jones Act") 22a

Section 101 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101 (1976) states:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for ship-building and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 207 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1117 (1976), states:

The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the commission's and Secretary's financial transactions shall

be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444: *Provided,* That it shall be recognized that, because of the business activities authorized by this chapter, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission or Secretary from the provisions of this chapter.

Section 210 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1120 (1976), states:

It shall be the duty of the Secretary of Commerce to make a survey of the American merchant marine, as it now exists, to determine what additions and replacements are required to carry forward the national policy declared in section 1101 of this title, and the Secretary of Commerce is directed to study, perfect, and adopt a long-range program for replacements and additions to the American merchant marine so that as soon as practicable the following objectives may be accomplished:

First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service essential for maintaining the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of such a fleet the Secretary of Commerce is directed to cooperate closely with the Navy Department as to national-defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

Second, the ownership and the operation of such a merchant fleet by citizens of the United States insofar as may be practicable.

Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils.

Fourth, the creation and maintenance of efficient shipbuilding and repair capacity in the United States with adequate numbers of skilled personnel to provide an adequate mobilization base.

Section 211 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1121 (1976), states:

The Secretary of Commerce is authorized and directed to investigate, determine, and keep current records of—

(a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Secretary of Commerce to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching his determination the Secretary of Commerce shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the for-

eign commerce of the United States, to the national defense, and to other national requirements;

(b) The bulk cargo carrying services that should, for the promotion, development, expansion, and maintenance of the foreign commerce of the United States and for the national defense or other national requirements be provided by United States-flag vessels whether or not operating on particular services, routes, or lines;

(c) The type, size, speed, method of propulsion, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service, or which should be employed to provide the bulk cargo carrying services necessary to the promotion, maintenance, and expansion of the foreign commerce of the United States and its national defense or other national requirements whether or not such vessels operate on a particular service, route, or line;

(d) The relative cost of construction of comparable vessels in the United States and in foreign countries;

(e) The relative cost of marine insurance, maintenance, repairs, wages and subsistence of officers and crews, and all other items of expense, in the operation of comparable vessels under the laws, rules, and regulations of the United States and under those of the foreign countries whose vessels are substantial competitors of any such American vessel;

(f) The extent and character of the governmental aid and subsidies granted by foreign governments to their merchant marine;

(g) The number, location, and efficiency of the shipyards existing on June 29, 1936, or thereafter built in the United States;

(h) To investigate and determine what provisions of this chapter and other Acts relating to shipping should be made applicable to aircraft engaged in foreign commerce in order to further the policy expressed in this chapter, and to recommend appropriate legislation to this end;

(i) The advisability of enactment of suitable legislation authorizing the Secretary of Commerce in an economic or commercial emergency, to aid the farmers and cotton, coal, lumber, and cement producers in any section of the United States in the transportation and landing of their products in any foreign port, which products can be carried in dry-cargo vessels by reducing rates, by supplying additional tonnage to any American operator, or by operation of vessels directly by the Secretary of Commerce, until such time as the Secretary of Commerce shall deem such special rate reduction and operation unnecesasry for the benefit of the American farmers and such producers; and

(j) New designs, new methods of construction, and new types of equipment for vessels; the possibilities of promoting the carrying of American foreign trade in American vessels; and intercoastal and inland water transportation, including their relation to transportation by land and air.

Section 212 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1122 (1976), states:

The Secretary of Commerce is authorized and directed—

(a) To study all maritime problems arising in the carrying out of the policy set forth in subchapter I of this chapter;

(b) To study, and to cooperate with vessel owners in devising means by which—

(1) the importers and exporters of the United States can be induced to give preference to vessels under United States registry; and

(2) there may be constructed by or with the aid of the United States express-liner or superliner vessels comparable with those of other nations, especially with a view to their use in national emergency, and the use in connection with or in lieu of such vessels of transoceanic aircraft service;

(c) To collaborate with vessel owners and shipbuilders in developing plans for the economical construction of vessels and their propelling machinery, of most modern economical types, giving thorough consideration to all well-recognized means of propulsion and taking into account the benefits accuring from standardized production where practicable and desirable; and

(d) To establish and maintain liaison with such other boards, commissions, independent establishments, and departments of the United States Government, and with such representative trade organizations throughout the United States as may be concerned, directly or indirectly, with any movement of commodities in the water-borne export and import foreign commerce of the United States, for the purpose of securing preference to vessels of United States registry in the shipment of such commodities.

The Federal Maritime Commission is authorized and directed—

(e) To investigate, under the regulatory powers transferred to it by this chapter, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

The Secretary of Commerce is authorized and directed—

(f) To study means and methods of encouraging the development and implementation of new concepts for the carriage of cargo in the domestic and foreign commerce of the United States, and to study the economics and technological aspects of the use of cargo containers as a method of carrying out the declaration of policy set forth in subchapter I of this chapter, and in carrying out the provisions of this subsection and such policy the United States shall not give preference as between carriers upon the basis of length, height, or width of cargo containers or length, height, or width of cargo container cells and this requirement shall be applicable to all existing container vessels and any container vessel to be constructed or rebuilt; and

(g) To make recommendations to Congress, from time to time, for such further legislation as he deems necessary better to effectuate the purpose and policy of this chapter.

Section 501 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1151 (1976), states:

(a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of higher transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel shall be

suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this subchapter and under such further conditions and limitations as may be prescribed in the rules and regulations of the Secretary of Commerce has adopted as provided in section 114(b) of this title; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this chapter.

Section 502 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1152 (1976), states:

(a) If the Secretary of the Navy certifies his approval under section 1151(b) of this title, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter into a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 1155 of this title with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors

related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this chapter, of building such vessel in a foreign shipyard.

(b) The amount of reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice

of his intention to compute or recompute such estimated foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 1155 of this title) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less. In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in

the same proportion as provided for the payments on account of the construction cost in the contract between the shipbuilder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on oustanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser, within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(d) Repealed. Pub. L. 87-877, § 2(a), Oct. 24, 1962, 76 Stat. 1200

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or unreasonable, and if a citizen of the United States agrees to purchase said

vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction differential subsidy determined as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall at least once each year, as required for purposes of this chapter, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under this subchapter and subchapter VII of this chapter, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or

shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this chapter, negotiate with the bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this chapter, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Commerce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for

the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under this subchapter, except section 1159 of this title) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this chapter. If the vessel is constructed under section 1159 of this title the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater the the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bid-

der, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 1125 of this title, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter. Such vessel shall thereupon be eligible for an operating-differential subsidy under subchapter VI of this chapter, notwithstanding the provisions of section 1171(a)(1), and section 1180(1) of this title, or any other provision of law.

Section 504 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1154 (1976), states:

If a qualified purchaser under the terms of this subchapter desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 1152 of this title, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel.

The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 1152(a) of this title or under a contract negotiated by the Secretary of Commerce as provided in section 1152(b) of this title in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 1153 of this title. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

Section 506 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1156 (1976), states:

Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States,

and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

Section 1104(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1274(a) (1976), states:

Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—

(1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally

for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 905 of this Act for purposes of title V of this Act; (D) in the fishing trade or industry; or (E) with respect to floating drydocks in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however*, That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1105 and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this title, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883 (Supp. 1979) states in relevant part:

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: . . .